SO ORDERED.

SIGNED this 17 day of August, 2010.

JAMES D. WALKER, JR.
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

IN RE:	)	CHAPTER 7
	)	CASE NO. 09-52242-JDW
SHIRLEY ANNE NOBLES,	)	
	)	
DEBTOR.	)	
	)	
WILLIAM M. FLATAU, TRUSTEE,	)	ADVERSARY PROCEEDING
	)	NO. 09-5106
PLAINTIFF,	)	
	)	
VS.	)	
	)	
CURINGTON, LLC,	)	
	)	
DEFENDANT.	)	

BEFORE

JAMES D. WALKER, JR.

UNITED STATES BANKRUPTCY JUDGE

COUNSEL

For Plaintiff: William M. Flatau
355 Cotton Avenue
Macon, Georgia 31201

For Defendant: Daniel Wilder
544 Mulberry Street
Macon, Georgia 31201

MEMORANDUM OPINION

This matter comes before the Court on Plaintiff's complaint to recover a preference. This is a core matter within the meaning of 28 U.S.C. § 157(b)(2)(F). After considering the pleadings, the evidence, and the applicable authorities, the Court enters the following findings of fact and conclusions of law in conformance with Federal Rule of Bankruptcy Procedure 7052.

Findings of Fact

In February 2009, Debtor Shirley Anne Nobles' home was damaged by fire. The structure of her home and various personal items were affected. In addition, certain items of personal property were destroyed, including two sofas, a chair, an end table, curtains, a water heater, and a stove. On February 24, 2009, Debtor and Curington LLC entered into a contract under which Debtor authorized Curington to "perform any and all necessary cleaning and/or restoration services" on Debtor's personal property. (Plaintiff's ex. 1.) The contract provided for payment "immediately upon [Debtor's] receipt of the [insurance] check." (Plaintiff's ex. 1.) It also provided, "If any amounts owing to Provider for Provider services are not covered by insurance, Client agrees to pay those amounts to Provider within fifteen (15) days of Client's receipt of invoice." (Plaintiff's ex. 1.) The contract did not indicate the cost of services. Debtor testified that at the time of signing the contract she asked Michael Curington, the owner of Curington LLC, how much the company would be charging her, and he responded that her insurance company would pay him.

On March 25, 2009, Mr. Curington prepared a detailed estimate for its services, totaling $26,879.25, which it submitted to an adjustor for Debtor's insurance company. Debtor did not

receive a copy of the estimate. By April 7, 2009, Curington finished cleaning most of Debtor's furniture and returned it to her over the course of the following two to three weeks.

On April 27, 2009, Mr. Curington contacted Debtor's insurance company to inquire about payment. He learned a check made out solely to Debtor had been forwarded to Debtor's insurance agent. On May 1, 2009, Curington prepared an invoice showing the amount due for the services provided to Debtor. Although Mr. Curington said he mailed the invoice to Debtor, she testified she did not receive it. Also on May 1, 2009, Debtor received a proceeds check from her insurance agent for $32,000. She deposited $30,000 into her bank account and used the remaining $2,000 to begin replacing items destroyed in the fire. Debtor testified that she believed the insurance company would pay Curington directly and that the $32,000 was issued to replace items that had been destroyed by the fire. Debtor's belief was due in part to Mr. Curington's prior statement to her that the insurance company would pay him and due in part to her insurance agency telling her the check was her money.

On the afternoon of Thursday, May 14, 2009, the parties engaged in a series of phone calls. First, Mr. Curington contacted Debtor to ask whether she had received the insurance proceeds. Debtor told him she received a check, but she did not believe any of the money was intended to compensate Curington.[1] Immediately after that conversation, Mr. Curington called Debtor's insurance company and discovered Debtor had received $32,000. Mr. Curington then called Debtor again and told her the money she received included the cost of his services. Debtor

[1] According to Debtor's testimony, no one from the insurance company advised her of how much it would pay to cover replacement of destroyed property versus how much it would pay to cover the repair of damaged property. As a result, she did not recognize the $32,000 as approximating her total loss for personal property.

told Mr. Curington she had never received a bill from him and did not even know how much was owed. Mr. Curington told her the balance due on the account and urged her to contact her insurance agent. Debtor did so and learned the $32,000 included money to pay Mr. Curington. Debtor then called Mr. Curington and told him she had spent some of the money but could pay him $15,000 and would try to get a loan to pay the balance.

The next time the parties talked was four days later on the morning of Monday, May 18, 2009. Debtor called Mr. Curington, told him she could pay $20,000, and agreed that he could come by her house that morning for the payment. When Mr. Curington arrived, Debtor gave him the check for $20,000, and he gave her an invoice. The payment and balance due was recorded on the invoice with a handwritten notation. At that time, Mr. Curington again refused to accept installment payments for the balance.

Over the following several weeks, Mr. Curington's efforts to contact Debtor went unanswered. As a result, he filed a state court action against her in June 2009. The Court has no facts about the lawsuit other than an entry in Curington's phone log that it received a judgment in its favor by mail on August 17, 2009. By that time, Debtor had already sought bankruptcy protection by filing a Chapter 7 petition on July 19, 2009.

The Chapter 7 Trustee filed a complaint to recover the $20,000 payment as a preference. After denying the Trustee's motion for summary judgment, the Court held a trial on July 16, 2010. Having considered the evidence and legal arguments, the Court will enter judgment for Curington.

Conclusions of Law

When a debtor pays a creditor on the eve of bankruptcy, the Bankruptcy Code provides

for avoidance of that payment in certain circumstances as set forth in 11 U.S.C. § 547:

> (b) Except as provided in subsections (c) and (I) of this section, the trustee may avoid any transfer of an interest of the debtor in property–
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made–
> (A) on or within 90 days before the date of the filing of the petition; or
> (B) between ninety days and one year before the date of the filing or the petition, if such creditor at the time of such transfer was an insider; and
> (5) that enables such creditor to receive more than such creditor would receive if–
> (A) the case were a case under chapter 7 of this title;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

The burden is on the Trustee to prove the elements of a preference. Id. § 547(g). In this case, most of the elements are undisputed. The payment benefitted Curington because it was for services provided by Curington. The payment was for an antecedent debt because the services were provided approximately 2 ½ months prior to payment. The payment was made within 90 days prior to the petition date, while Debtor was presumed insolvent under § 547(f). Finally, the Trustee provided an affidavit indicating only $325 is available for distribution to unsecured creditors holding $14,970.55 in claims; thus, the $20,000 payment greatly exceeds what Curington would receive in a hypothetical liquidation.

Curington raised three defenses to the preference. First, it argued the payment was subject to a constructive trust in favor of Curington. Thus, the transfer was not of an interest of

Debtor in property. Second, Curington raised an affirmative defense that the transfer was made in the ordinary course of business. Third, Curington argued the payment was made contemporaneously with the provision of services. Curington abandoned the contemporaneous exchange defense at trial. Therefore, the Court need only consider whether Debtor transferred her property and whether the transfer was made in the ordinary course of business.

An Interest of the Debtor in Property

Curington argues Debtor had no interest in the money transferred because it was held in constructive trust for Curington. Under Georgia law, a constructive trust is a type of implied trust. O.C.G.A. § 53-12-2(5) (2010).[2] A constructive trust may be imposed "whenever the circumstances are such that the person holding legal title to property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity." Id. § 53-12-132(a). The Georgia Supreme Court has described a constructive trust as a remedy to prevent unjust enrichment. St. Paul Mercury Ins. Co. v. Meeks, 270 Ga. 136, 137, 508 S.E.2d 646, 648 (1998). It generally applies when the debtor wrongfully obtains the property at issue. See Aero Housewares, LLC v. Interstate Restoration Group, Inc. (In re Aero Plastics, Inc.), No. 05-60451-MHM, 2006 WL 6589869, at *4 (Bankr. N.D. Ga. Sept. 28, 2006) (citing Bateman v. Patterson, 212 Ga. 284, 285, 92 S.E.2d 8, 10 (1956)).[3] In other

[2] Title 53 of the Georgia Code, which governs trusts, underwent significant revisions effective July 1, 2010. Although the revisions resulted in renumbering of sections related to constructive trusts, the substance of those provisions is unchanged. Therefore, case law interpreting those provisions remains viable.

[3] By contrast, a resulting trust–another form of implied trust–arises when no party intended the holder of legal title to property to also hold a beneficial interest in the property. O.C.G.A. § 53-12-130; see also Tidwell v. Hendricks (In re McDowell), 258 B.R. 296, 301-03 (Bankr. M.D. Ga. 2001) (finding an implied trust when a loan was made for a specific purpose

words, Curington must have an interest in the proceeds that was in some way undermined or usurped by Debtor's fraudulent or inequitable conduct, such as fraudulently inducing Curington to provide her with services.[4] Debtor's right to the proceeds was established by her insurance policy. Although the contract between Debtor and Curington contemplates payment upon Debtor's receipt of the insurance proceeds, it in no way purports to transfer Debtor's interest in the proceeds to Curington by assignment or other means. Because a mere contractual right to payment does not by itself give rise to a constructive trust over the expected source of funds for payment, the Court finds no basis for finding the insurance proceeds were subject to a constructive trust. Instead, they were property of Debtor. Thus, the $20,000 payment to Curington consisted of a transfer of an interest of Debtor in property, and the Trustee has proved a prima facie case for a preference.

Ordinary Course of Business

The Bankruptcy Code provides an affirmative defense to preference claims for transfers made in the ordinary course of business.

> (c) The trustee may not avoid under this section a transfer–
> ...
> (2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was--
> (A) made in the ordinary course of business or

and when the debtor had no right to put the loan proceeds to any other use).

[4] Even assuming Debtor fraudulently induced Curington to enter into the contract with knowingly false promises to turn over insurance proceeds, Curington waived its right to a constructive trust by suing Debtor in state court for the balance due on the contract. Ekeledo v. Amporful, 281 Ga. 817, 819, 642 S.E.2d 20, 22 (2007) (citing O.C.G.A. § 53-12-93(b), recodified at § 53-12-132(b)).

financial affairs of the debtor and the transferee; or
(B) made according to ordinary business terms[.]

11 U.S.C. § 547(c)(2). Curington bears the burden to prove the ordinary course of business defense. Barrett Dodge Chrysler Plymouth, Inc. v. Cranshaw (In re Issac Leaseco, Inc.), 389 F.3d 1205, 1210 (11th Cir. 2004). To succeed, Curington must show the debt related to the transaction was incurred in the ordinary course of business and that the payment was either ordinary between the parties or ordinary in relation to industry standards.[5]

First, the Court must consider how the debt was incurred. The testimony of the parties indicate it was the result of an arm's-length transaction with a legitimate purpose. See Weathers v. Spartan Polymers, Inc. (In re Firstline Corp.), No. 06-70145, Adv. No. 07-7019, 2008 WL 2246902, at *3 (Bankr. M.D. Ga. May 29, 2008) (Walker, J.). Debtor's personal property was damaged by fire. She hired Curington to provide services to restore her property, which is part of its normal business operation. Based on these facts, the Court is satisfied Curington has proved the first element of its defense.

Next, the Court must consider the manner of payment–whether it was ordinary between the parties or ordinary according to industry standards. Curington has offered no evidence as to industry standards. Therefore, it can only prevail if it shows the payment was "made in the ordinary course of business or financial affairs" between the parties. Because transaction in this case was the first one between the parties, the Court has no historical record for testing the ordinariness of the payment. Nevertheless, Curington may still prove the applicability of the

[5] Prior to amendments enacted in 2005, defendants were required to prove all three elements of the defense. Now, they must prove two. However, the relevant language of the statute remains unchanged, and the Court may rely on prior case law interpreting that language. 5 Collier on Bankruptcy ¶ 547.02[2] (16th ed. 2010).

defense. "Where parties have no extensive history of credit transactions to which a disputed payment can be related, their express agreement furnishes 'the most informative evidence left to consider' of the ordinariness of a transaction from the parties' perspective." Carrier Corp. v. Buckley (In re Globe Mfg. Corp.), 567 F.3d 1291, 1298 (11th Cir. 2009) (quoting Logan v. Basic Distrib. Corp. (In re Fred Hawes Org., Inc.), 957 F.2d 239, 245 (6th Cir. 1992)).

This Court previously has held that payments timely made according to contract terms in a retail installment contract for a motor vehicle were made in the ordinary course of business. Kelley v. Chevy Chase Bank (In re Smith), 238 B.R. 879, 880 (Bankr. M.D. Ga. 1999) (Walker, J.). In Smith, the payments at issue were the first two payments under the contract. In a prior decision in the case, the Court noted that the ordinary course defense applies "even if it is the first transaction between the debtor and the creditor, so long as it is a 'normal financial relation' and not an 'unusual action' undertaken during the 'slide into bankruptcy.'" Kelley v. Chevy Chase Bank (In re Smith), 236 B.R. 91, 102 (Bankr. M.D. Ga. 1999) (Walker, J.) (quoting Gosch v. Burns (In re Finn), 909 F.2d 903, 907-08 (6th Cir. 1990)). By contrast, this Court rejected the ordinary course defense with respect to a first time transaction when the contract required payment within 30 days of the invoice, but the payment was not made until 106 days after the invoice. Firstline Corp., 2008 WL 2246902, at *1, 4.

The Trustee has argued the payment in this case is not ordinary for three reasons. First, Curington engaged in unusual collection efforts by contacting Debtor's insurance company, calling the Debtor to ask when she would be submitting payment, and going to Debtor's house to pick up the payment. Second, the timing of the payment was inconsistent with the contract terms that required payment immediately upon Debtor's receipt of insurance proceeds. Third, the

amount of the payment was inconsistent with the contract terms that required payment in full. The Court finds none of these arguments persuasive.

As to Curington's collection efforts, some courts have refused to apply the ordinary course defense in the face of unusual collection activities by the creditor. However, those activities generally include some specific economic threat to the debtor. See Precision Walls, Inc. v. Crampton, 196 B.R. 299, 304-05 (E.D.N.C. 1996) (threat by subcontractor to general contractor to seek payment from owner was sufficiently unusual to bar ordinary course defense as to resulting payments); Xtra, Inc. v. Seawinds, Ltd. (In re Seawinds, Ltd.), 888 F.2d 640, 641 (9th Cir. 1989) (payments made in response to contract termination, demand for return of equipment, and increased rates on remaining equipment were outside of ordinary course); Brown v. Heigel Lumber & Hardware (In re Mid-South Cabinet & Millwork, Inc.), 125 B.R. 16 (Bankr. E.D. Ark. 1990) (payments made after threat to suspend credit was outside of ordinary course); Schwinn Plan Committee v. AFS Cycle & Co., Ltd. (In re Schwinn Bicycle Co.), 205 B.R. 557, 572-73 (Bankr. N.D. Ill. 1997) (payments made after threats to suspend shipments were the result of unusual collection activity and outside the ordinary course). On the other hand, mere requests or demands for payment do not take a transaction outside the scope of the ordinary course defense. See Branch v. Ropes & Gray (In re Bank of New Engl. Corp.), 161 B.R. 557, 561-62 (Bankr. D. Mass. 1993) (reminder letters about unpaid invoices did not constitute unusual collection efforts and did not defeat the ordinary course defense); Harrison v. The Ink Spot (In re Rave Comm., Inc.), 128 B.R. 369, 373 (Bankr. S.D.N.Y. 1991) (reminder letters about the payment terms were not unusual collection efforts outside the ordinary course of business, even when they included a tacit threat to halt delivery of goods); McCarthy v. Navistar Fin. Corp. (In re Vogel Van &

Storage, Inc.), 210 B.R. 27, 35-36 (N.D.N.Y. 1997) (daily phone calls urging payment were not unusual for purposes of the ordinary course defense in the absence of any economic threats).

In this case Mr. Curington contacted the insurance company on April 27, 2009, and learned the insurance proceeds would be paid to Debtor. On May 1, 2009, Curington prepared an invoice and mailed it to Debtor–although she said she never received it. On May 14, 2009, Mr. Curington again contacted the insurance company and learned Debtor had received the insurance proceeds on May 1. Immediately following that conversation, Mr. Curington contacted Debtor. Debtor indicated she had received money but she did not believe it was for Curington's services. At that point, both Debtor and Mr. Curington contacted the insurance company. Both were informed the money Debtor received did include payment for Curington's services. Debtor told Mr. Curington she had spent some of the money and could pay him $15,000. He refused her request to pay the remainder in installments. On May 18, Debtor said she could pay $20,000 and that Mr. Curington could come pick it up.

The sort of transactions that arise as the result of a house fire are unlike everyday credit transactions familiar to consumers. The source of the creditor's payment is, in whole or in part, insurance proceeds rather than the debtor's income or other assets. In such circumstances, Curington's phone calls to the insurance company were not unusual collection practices. Instead, Curington made the reasonable decision not to engage in any collection efforts until it was sure Debtor had received her insurance proceeds. The insurance company itself was the best source of that information. Subsequent phone calls were made to help clarify the scope of the proceeds in the face of Debtor's confusion. Debtor believed Curington was paid separately and directly from the insurance company. The insurance company was the only party that could set Debtor

straight. Furthermore, these facts show no indication of coercion. Curington made no threats against Debtor–economic or otherwise–to induce the $20,000 payment. Instead, Mr. Curington simply demanded payment and refused to negotiate a payment schedule for any deficiency. In the circumstances, the Court concludes Curington's various phone calls to Debtor and her insurance company were not out of the ordinary.

As to the timeliness of the payment, the contract provided for payment immediately upon receipt of insurance proceeds and, to the extent insurance did not cover Curington's services, for payment within 15 days of Debtor's receipt of an invoice. In this case, Debtor did not learn she owed Curington any money until her various conversations with Mr. Curington and her insurance company on the afternoon and evening of May 14, 2009, which was a Thursday. She made the payment at issue on the morning of Monday, May 18, 2009, by personally handing a check to Mr. Curington. The Court finds that making a payment two business days after learning of the existence and amount of a debt is sufficient to satisfy a contractual requirement for immediate payment.

The last remaining issue is Debtor's failure to pay the full amount due under the contract. A handful of cases have considered partial payments as a factor in refusing to apply the ordinary course of business defense. However, in these cases, partial payments are coupled with other factors indicating the payment was not ordinary. For example, in Ratnor Holdings Corp. v. PPT Consulting, LLC (In re Ratnor Holdings Corp.), No. 06-10894, Adv. No. 08-51184, 2009 WL 2004226 (Bankr. D. Del. July 9, 2009), the debtor and creditor had a history of transactions in which the debtor paid invoices in full within about 60 days on average. In light of that history, the court found payments that were both partial and late (more than 110 days after the invoice

date) to be outside the ordinary course of business. Id. at *6. See also Sweetapple Plastics, Inc. v. Philip Shuman & Sons, Inc. (In re Sweetapple Plastics, Inc.), 77 B.R. 304, 312 (Bankr. M.D. Ga. 1987) (payment was not ordinary when it was both partial and late according to the terms of the contract). In this case, the payment was neither untimely nor made after a history of full payments. Furthermore, the contract itself contemplates the possibility of two payments made at different times–a payment immediately upon receipt of insurance proceeds and a payment for services not covered by insurance made within 15 days after receipt of the invoice. The insurance company issued Debtor $32,000 for personal property loss without ever telling her how it allocated the money for damage versus destruction. Debtor used some of that money to replace property that had been destroyed by the fire. The remaining money was not sufficient to fully cover Curington's fee. Debtor paid what remained of the proceeds to Curington. Even if partial payment alone were enough to remove a payment from the ordinary course of business, the Court cannot conclude the payment at issue was partial. Instead, it represented a payment of available insurance proceeds. In accordance with the contract, the remaining balance could be paid separately by Debtor.

Conclusion

The ordinary course of business defense "protect[s] those payments which do not result from 'unusual' debt collection or payment practices." Marathon Oil Co. v. Flatau (In re Craig Oil Co.), 785 F.2d 1563, 1566 (11th Cir. 1986). In this case, the Court finds nothing unusual about the collection methods or the payment. In addition, although the parties had no prior history of transactions, the payment conformed with the terms of the contract. For the foregoing reasons, the Court finds Curington has met its burden to prove the payment was made in the

ordinary course of business. Therefore, the payment is not a preference, and the Court will enter judgment for Curington.

An Order in accordance with this Opinion will be entered on this date.

END OF DOCUMENT